

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE LEAPFROG ENTERPRISE, INC.
SECURITIES LITIGATION,

Case No. [15-cv-00347-EMC](#)

This Document Relates to:

**ORDER DENYING DEFENDANTS'
MOTION FOR LEAVE TO FILE
MOTION FOR RECONSIDERATION**

All Actions.

Docket No. 131

Currently pending before the Court is Defendants' motion for leave to file a motion for reconsideration. Having considered the parties' briefs and accompanying submissions, the Court hereby **DENIES** Defendants' motion.

According to Defendants, they should be given leave to file a motion to reconsider because "a material difference in . . . law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought." Civ. L.R. 7-9(b)(1). More specifically, Defendants point to the Ninth Circuit's recent opinion in *City of Dearborn Heights Act 345 Police & Fire Retirement System v. Align Technology, Inc.*, 856 F.3d 605 (9th Cir. 2017).

Align, however, is not – as Defendants claim – a change in the controlling law. Rather, *Align* simply confirms that *Omnicare, Inc. v. Laborers District Council Construction Industrial Pension Fund*, 135 S. Ct. 1318 (2015), is the governing law. The Court acknowledges that, in *Align*, the Ninth Circuit stated the following: "[T]o the extent our current standard permits plaintiffs to plead falsity by alleging that 'there is no reasonable basis for the belief' under the material misrepresentation theory of liability, it is 'clearly irreconcilable' with *Omnicare*, and is therefore overruled.'" *Align*, 856 F.3d at 616. But that is just a statement confirming the law under *Omnicare*. And even if *Align* could be considered something more, it simply means that,

1 for a material misrepresentation theory of liability, a plaintiff must plead not just objective falsity
2 but also subjective falsity, and that is what Lead Plaintiff did in the instant case. *See, e.g.*, Docket
3 No. 117 (Order at 12-16) (discussing scienter and falsity for claims related to the long-lived asset
4 impairment).

5 To the extent Defendants argue that “*Align* changed the law in the way it applied the new
6 pleading standard,” Mot. at 4, the Court is still not persuaded. Nothing in *Align* makes a blanket
7 ruling that, in a securities fraud case related to accounting impairment, a plaintiff must make
8 allegations about the assumptions that the defendants used in the accounting analysis in order to
9 survive a motion to dismiss. Rather, it was the specific situation in *Align* that made allegations
10 about such assumptions important.

11 In any event, even affording reconsideration on the merits, the Court finds that *Align* is
12 materially distinguishable from the instant case. In *Align*, the Ninth Circuit concluded that the
13 channel stuffing of the acquired company was not obvious to the management of the acquiring
14 company, especially because the channel stuffing concerned the acquired company and predated
15 the acquisition. Here, Lead Plaintiff has made a plausible claim of obviousness – *i.e.*, that
16 Leapfrog management kept track of Leapfrog stock increases and decreases and thus undoubtedly
17 knew about the steep stock decline in 3Q, a key factor informing the long-lived asset analysis (at
18 least as claimed by Defendants by the time of 4Q). Also, in *Align*, missing allegations about the
19 assumptions the defendants used in conducting their goodwill analysis were crucial because not
20 only were there negative factors suggesting impairment, but also there were positive and
21 mitigating factors suggesting the opposite. In the instant case, there are no clear positive and
22 mitigating factors with respect to long lived assets – at least none identified by the parties. This
23 stands in contrast to goodwill analysis upon which this Court ruled where there were positive and
24 mitigating factors (*i.e.*, the upcoming holiday season) leading this Court to find there was no
25 viable claim for securities fraud with respect thereto.

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1 Accordingly, Defendants' motion – whether construed as a motion for leave or a motion to
2 reconsider – is denied.

3 This order disposes of Docket No. 131.

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5 **IT IS SO ORDERED.**

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7 Dated: August 10, 2017

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9 EDWARD M. CHEN
10 United States District Judge
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